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Paper No. 26

BANNER & WITCOFF
1001 G STREET N W
SUITE 1100
WASHINGTON DC 20001

In re Application of :
Mockry, et al. :
Application No.09/878,860 : ON PETITION
Filed: 10 May, 2002 :
Attorney Docket No. 006385.00001 :

This is a decision on a renewed petition (styled: "Request for Reconsideration and Final Agency Action I Connection with Petition for Corrected Filing Date") filed on 12 March, 2004 (but not delivered to this office until this writing)--treated as a petition under 37 C.F.R. §1.53--which requests that the application be accorded a filing date of 9 June, 2001, rather than the presently accorded filing date of 10 May, 2002.

The petition is **DENIED.**¹

BACKGROUND

The application was deposited as a nonprovisional application on 9 June, 2001, by the then-*pro se* applicants George Mockery and co-inventor Greg M. Mockery (hereinafter Messrs. George and Greg Mockery or Applicants).

On 15 March, 2002, the Office mailed a "Notice of Incomplete Nonprovisional Application" and indicated that a filing date was not granted for the application because "the specification does not include a written description of the invention."

¹This decision may be viewed as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See MPEP 1002.02. The provisions of 37 CFR 1.181(f) do not apply to this decision.

On 10 May, 2002, Messrs. George and Greg Mockery submitted:

- a petition (with fee) for a filing date;
- a copy of the Provisional Application No. 60/211,208 filed on 13 June, 2000;
- a copy of their receipt card from the deposit (the record reflects that the date stamp 6/9/019 is crossed out and a date stamp of 5/10/02 is substituted);
- a supporting declaration of George Mockery² contending that he assembled a copy of the provisional application, declarations for himself and his co-inventor Greg M. Mockery, a page of claims, a check in the amount of \$355.00 and a self-addressed stamped receipt card, and submitted the package via US Postal Service Express Mail on 9 June, 2001.

The petition contended that their date-stamped receipt card supported their plea for relief.

The contents of the postcard are as follows:

NEW APPLICATION TRANSMITTAL (SMALL ENTITY)
4 ORIGINAL COPIES OF PROVISIONAL
PAGE "CLAIMS"
CASHIERS CHECK FOR \$355.00
2 DECLARATION FORMS
SELF ADDRESSED POST CARD (FOR RECEIPT PURPOSES)

Notably, the post card fails to state not only the number of pages in the provisional application, but any identifying information about the application such as the application number and filing date (in this case 60/211,208 and 13 June, 2000, respectively).

² The declaration of George Mockery states, in pertinent part:

* * *

During the first week of June, 2001, Greg M. Mockery and I decided to file a regular non-provisional application based on our then-pending provisional application, Ser. No. 60/211,208, filed June 13, 2000. I assembled all the papers, including Declarations signed respectively by myself and Greg M. Mockery; a specification, which was in the form of a complete copy of the above-mentioned provisional application Ser No. 60/211, 202 (sic); a page of Claims; a cashier's check from Citizen State Bank of Cortez for \$355.00; and a self-addressed stamped post card that listed each item being submitted. I then placed these materials into an envelope addressed to the Commissioner of Patents with sufficient postage for Express Mail. This envelope was deposited with the United States Postal Service on June 9, 2001.

A few days later I received back the return receipt post card, which now carried indicia showing the filing date (06/09/01) and the application serial number (09/878[.]860). The exhibit attached hereto is a true copy of the said return receipt post card. The post card has not been altered in any way since I received it.

* * *

Signed /s/ George Mockery
Dated this 15th day of April, 2002

The 10 May petition was dismissed on 14 August, 2002, in a decision which first noted:

* * *

Unfortunately, Petitioner's postcard receipt does not identify the number of pages filed in the specification, but only notes that "4 original copies of provisional" were filed. Thus applicant's postcard receipt fails to demonstrate that a written description of the invention was present upon filing the instant application[;]

* * *

then referenced for the applicants the provisions of MPEP §503, and concluded:

* * *

If a written description of the invention (pages 1 and 2 of the specification) was not present on the June 9, 2001, filing date, it cannot be considered as part of the original disclosure of the application. Petitioner has failed to satisfactorily demonstrate that a written description of the invention was present in the Office on June 9, 2001. Therefore, the application cannot be accorded the June 9, 2001, filing date with a written description of the invention as a part of the original disclosure. The issue of new matter is one appropriately addressed by the primary examiner during prosecution of the application after the filing date of the application has been determined.³

* * *

A renewed petition filed on 7 October, 2002, argued that:

- the applicants, acting *pro se*, assembled and submitted the materials consisting of a copy of the provisional application
- on deposit the Office did not alter the post card content listing, thus indicating that the Office received the complete application; and then
- on 20 December, 2001, the Office issued a filing receipt and a foreign filing license and set a projected publication date of 28 March 2002; and
- it was not until 15 March, 2002, that for the first time the Office determined that the application was incomplete.

In dismissing the 7 October petition on 18 November, 2002, the decision stated:

³ Decision on Petition of 14 August, 2002, at page 2.

* * *

While Petitioners can report * * * what they recall doing more than 17 months prior to this writing and submit what purports to be a copy of a certified copy of their provisional application * * *, Petitioners' receipt card does not detail the content more specifically than "copies of provisional"--there is no indication as to what provisional is being referenced, the number of pages included, or the elements contained therein (See: MPEP §503).

* * *

In seeking further reconsideration in this matter, a petition filed by present Counsel (Petitioner) on 9 September, 2003, contended that the Applicants' "postcard does itemize each of the component parts that were submitted."

And continued:

* * *

Comparing the itemized list of the postcard to the MPEP instructions, one sees that each of the component parts are (sic) separately listed, *viz.*, the claims are specified (item 3), the declaration is specified (item 5), the filing fee is specified (item 4) and contrary to the previous decisions the specification ins specified (item 2) "4 Original Copies of Provisional." What else could this item constitute? Applicant was submitting a patent application.

* * *

In dismissing the 9 September petition, the 21 November, 2003, decision stated:

* * *

It is the duty of applicants to evidence in clear, unmistakable, non-equivocating language what an "item constitutes," and they do not satisfy that requirement with their inquiry as to "what else"--what other possibility--they could be or could have been referring.

Applicants failed to identify in their postcard receipt their provisional application by number and filing date. They did not specify the number of pages contained. They failed to set forth what provisional it was they were submitting to stand as their specification.

Thus, they failed to identify their written description, which is a requirement of a non-provisional application and without which an application cannot obtain a filing date.

They do not now carry their burden of proof by inquiring as to what else it could have been.

* * *

Thus, the 9 September, 2003, petition was dismissed on 21 November, 2003, for failure once again to support the allegation that Applicants deposited with the Office of the entire application—including the written description—on 9 June, 2001.

Petitioner contends in the most recent petition of 12 March, 2004, that:

- the Office ignored Applicants' arguments of 7 October, 2003, with regard to the filing receipt mailed by the Office on 20 December, 2001;
- the filing receipt, rather than Applicants' receipt card, controls as to defining which items were received by the Office on the deposit date of 9 June, 2001;
- the Office's practice, stated at MPEP §506, imposed an "affirmative duty on the Office of Initial Patent Examination (OIPE) to give the applicant notice of any defects in the filing of a nonprovisional application, and to issue a PTO-1123 Notice of Incomplete Application."

It is clear from the facts recited above that, contrary to Petitioner's suggestion, the Office indeed issued a Notice of Incomplete Application on 15 March, 2002. While this may not have been as quick a response to the deposit by Messrs. George and Greg Mockery as the Office seek to provide, Petitioner apparently and conveniently ignores the interruptions and delays in many government functions that resulted in the several months following September 2001.

Now the remaining two of Petitioner's contentions are addressed below.

STATUTES AND REGULATION

35 U.S.C. §21 states in pertinent part:

* * *

(a) The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruption or emergencies designated by the Director.

* * *

35 U.S.C. §111 states in pertinent part:

* * *

(a) In general.

(1) Written Application. An application for patent shall be made, or authorized to be made, by the inventor, except as otherwise provided in this title, in writing to the Director.

(2) Contents. Such application shall include--

- (A) a specification as prescribed by section 112 of this title;
- (B) a drawing as prescribed by section 113 of this title;
- (C) an oath by the applicant as prescribed by section 115 of this title

(3) Fee and oath. The application must be accompanied by the fee required by law. The fee and oath may be submitted after the specification and any required drawing are submitted, within such period and under such conditions, including the payment of a surcharge, as may be prescribed by the Director.

(4) Failure to submit. Upon failure to submit the fee and oath within such prescribed period, the application shall be regarded as abandoned, unless it is shown to the satisfaction of the Director that the delay in submitting the fee and oath was unavoidable or unintentional. The filing date of an application shall be the date on which the specification and any required drawing are received in the Patent and Trademark Office. (Emphasis supplied.)

* * *

35 U.S.C. §112 states in pertinent part:

* * *

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention. (Emphasis supplied.)

* * *

37 C.F.R. §1.53(b) states in pertinent part:

* * *

Application filing requirements--Nonprovisional application. The filing date of an application for patent filed under this section, except for a provisional application under paragraph (c) of this section or a continued prosecution application under paragraph (d) of this section, is the date on which a specification as prescribed by 35 U.S.C. §112 containing a description pursuant to §1.71 and at

least one claim pursuant to §1.75, and any drawing required by §1.81(a) are filed in the Patent and Trademark Office.

* * *

37 C.F.R. §1.71 states in pertinent part:

* * *

(a) The specification must include a written description of the invention or discovery and of the manner and process of making and using the same, and is required to be in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which the invention or discovery appertains, or with which it is most nearly connected, to make and use the same.

(b) The specification must set forth the precise invention for which a patent is solicited, in such manner as to distinguish it from other inventions and from what is old. It must describe completely a specific embodiment of the process, machine, manufacture, composition of matter or improvement invented, and must explain the mode of operation or principle whenever applicable. The best mode contemplated by the inventor of carrying out his invention must be set forth. (Emphasis supplied.)

* * *

OPINION

The most recent renewed petition again requests that the application be accorded a filing date of 9 June, 2001, rather than the presently accorded filing date of 10 May, 2002.

Petitioner argues that the Office has failed to consider the argument that MPEP §503⁴ is

⁴ MPEP §503 provides in pertinent part:

§503 Application Number and Filing Receipt

* * *

If a self-addressed postcard is submitted with a patent application, that postcard will be provided with both the receipt date and application number prior to returning it to the addressee. The application number identified on such a postcard receipt is merely the preliminary assignment of an application number to the application, and should not be relied upon (e.g., with respect to foreign filings) as necessarily representing the application number assigned to such application. See 37 C.F.R. §1.53(b).

The identifying data on the postcard should include:

- (A) applicant's name(s);
- (B) title of invention;
- (C) number of pages of specification, claims (for nonprovisional applications), and sheets of drawing;
- (D) whether oath or declaration is included;
- (E) a list of any additional forms included with the application (e.g., application transmittal form, application data sheet, fee transmittal form, and/or provisional application cover sheet); and
- (F) amount and manner of paying the fee.

A return postcard should be attached to *each* patent application for which a receipt is desired. It is important that the return postcard itemize all of the components of the application. If the postcard does not itemize each of the components of the application, it will not serve as evidence that any component which was not itemized was received by the United States Patent and Trademark Office (USPTO). It should be recognized that the identification of an application by application number does not necessarily signify that the USPTO has accepted the application as complete (37 C.F.R. §1.53(a)).

OIPE mails a filing receipt to the attorney or agent, if any, otherwise to the applicant, for each application filed which meets the minimum

controlling in this matter. Specifically, Petitioner states:

* * *

MPEP §503 makes the issuance of a filing receipt by the USPTO *prima facie* evidence of compliance with Rule 53(b). [Quotation of the provision omitted.]

* * *

Here, a filing receipt was mailed to applicants in December 2001, long prior to the date the Office issued the Notice o (sic) Incomplete Application in March 2002.

Based on the USPTO's own rules, the complete application, thus was received and processed by OIPE. It was not until after that date that the USPTO apparently lost the application. (Emphasis supplied.)

* * *

requirements to receive a filing date. The filing receipt includes the application number, filing date, a confirmation number, a suggested class in the U.S. Patent Classification System (see MPEP §902.01), and the number of an art unit where the application is likely to be examined. The filing receipt also includes other information about the application as applicable, such as continuing data, national stage data, foreign priority data, foreign filing license data, entity status information, and the date the Office anticipates publishing the application under 35 U.S.C. §122(b). The filing receipt represents the official assignment by the USPTO of a specific application number and confirmation number to a particular application. See 37 C.F.R. §1.54(b). The application number officially assigned to an application on the filing receipt may differ from the application number identified on a postcard receipt submitted with such application, and, as between inconsistent filing receipts and postcard receipts, the application number on the filing receipt is controlling.

* * *

A nonprovisional application, other than a CPA filed under 37 C.F.R. §1.53(d), is entitled to a filing date as of the date of receipt of the specification, including claims, and any required drawing. See 37 C.F.R. §1.53(b). The filing receipt will be mailed at the time a determination is made that the application meets the minimum requirements to receive a filing date. The oath or declaration and filing fee may be filed later than the remaining application papers, but if so, they must be accompanied by the required surcharge. See 37 C.F.R. §1.53(f). If the oath or declaration, and/or filing fee, and appropriate surcharge are not timely filed, the application will be abandoned.

* * *

RETURN POSTCARD

If a receipt of any item (e.g., paper or fee) filed in the USPTO is desired, it may be obtained by enclosing with the paper a self-addressed postcard specifically identifying the item. The USPTO will stamp the receipt date on the postcard and place it in the outgoing mail. A postcard receipt which itemizes and properly identifies the items which are being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.

The identifying data on the postcard should be so complete as to clearly identify the item for which receipt is requested. For example, the postcard should identify the applicant's name, application number (if known), confirmation number (if known), filing date, interference number, title of the invention, etc. The postcard should also identify the type of paper being filed, e.g., new application, affidavit, amendment, notice of appeal, appeal brief, drawings, fees, motions, supplemental oath or declaration, petition, etc., and the number of pages being submitted. If a new application is being filed, all parts of the application being submitted should be separately listed on the postcard, e.g., the number of pages of specification (including written description, claims and abstract), number of claims, number of sheets of drawings, number of pages of oath/declaration, number of pages of cover sheet (provisional application).

The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard "a complete application" or "patent application" will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee) or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portion of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard. Furthermore, merely incorporating by reference in the postcard receipt, the items listed in a transmittal letter will not serve as *prima facie* evidence of receipt of those items.

The person receiving the item(s) in the USPTO will check the listing on the postcard against the item(s) being filed to be sure they are properly identified and that all the items listed on the postcard are presently being submitted to the USPTO. If any of the items listed on the postcard are not being submitted to the USPTO, those items will be crossed off and the postcard initialed by the person receiving the items. Upon return of a postcard receipt from the USPTO, the postcard receipt should be promptly reviewed by the person who filed the items to ensure that every item specifically denoted on the postcard was received by the USPTO. If the postcard receipt has been annotated to indicate that a particular item denoted on the postcard was not received by the USPTO, the postcard receipt will not serve as *prima facie* evidence of receipt of that item in the USPTO.

From the outset, Petitioner here fails to distinguish as between United States statutes, Office Rules of Practice (or regulations), and Office policy.

The MPEP itself clarifies the matter at its *Introduction*,⁵ which states:

* * *

Statutes

Pursuant to the provision of the Constitution, Congress has over the years passed a number of statutes under which the U.S. Patent and Trademark Office is organized and our patent system is established. The provisions of the statutes can in no way be changed or waived by the U.S. Patent and Trademark Office.

* * *

By an Act of Congress approved July 19, 1952, which came into effect on January 1, 1953, the patent laws were revised and codified into substantially its present form. The patent law is Title 35 of the United States Code which governs all cases in the U.S. Patent and Trademark Office.

* * *

Rules

One of the sections of the patent statute, namely, 35 U.S.C. 2, authorizes the Commissioner of Patents and Trademarks, subject to the policy direction of the Secretary of Commerce, to establish regulations, not inconsistent with law, for the conduct of proceedings in the U.S. Patent and Trademark Office.

These regulations or rules and amendments thereto are published in the *Federal Register* and in the *Official Gazette*. In the *Federal Register* and in the Code of Federal Regulations the rules pertaining to patents are in Parts 1, 3, 4, 5, and 10 of Title 37, Patents, Trademarks, and Copyrights.

* * *

Publications Available from Superintendent of Documents

* * *

Manual of Patent Examining Procedure. [MPEP] A loose-leaf manual which serves primarily as a detailed reference work on patent examining practice and procedure for the U.S. Patent and Trademark Office's Examining Corps including statutes, rules, treaties, etc.

Subscription service includes basic manual, revisions, and change notices.

* * *

Thus, the MPEP is “a reference work on practice and procedure”—a commentary or guidance—and does not constitute, as Petitioner has chosen to mis-characterize it as “the USPTO’s own rules.”

Moreover, a review of the commentary at MPEP §503 demonstrates that it Office expressly considers the receipt card—and not the filing receipt—*prima facie* evidence of compliance with the rules of practice (37 C.F.R.).

⁵ MPEP, *Introduction*, pages 1-2.

Further, Petitioner confuses what the MPEP states . . . and what it does not.

Petitioner quotes MPEP §503:

* * *

The filing receipt represents the official assignment by the USPTO of a specific application number and confirmation number to a particular application. * * * [A]s between inconsistent filing receipts and postcard receipts, the application number on the filing receipt is controlling. (Emphasis, Petitioner.)

* * *

Thus, Petitioner seeks to bootstrap his argument—to wit: because the filing receipt controls over the receipt card as to the application number assigned by the Office, the filing receipt also controls over the receipt card as to what documents came in the Office door on the date of deposit.

That is not the case.

The MPEP commentary expressly states that the Office considers the filing receipt controlling as to the application number assigned by the Office—not as to the determination of the papers deposited by the applicants with the Office.

The MPEP is express as to the matter of what papers the Office does and does not acknowledge as received on the date of deposit:

* * *

RETURN POSTCARD

If a receipt of any item (e.g., paper or fee) filed in the USPTO is desired, it may be obtained by enclosing with the paper a self-addressed postcard specifically identifying the item. The USPTO will stamp the receipt date on the postcard and place it in the outgoing mail. A postcard receipt which itemizes and properly identifies the items which are being filed serves as *prima facie* evidence of receipt in the USPTO of all the items listed thereon on the date stamped thereon by the USPTO.

The identifying data on the postcard should be so complete as to clearly identify the item for which receipt is requested. For example, the postcard should identify the applicant's name, application number (if known), confirmation number (if known), filing date, interference number, title of the invention, etc.
The postcard should also identify the type of paper being filed, e.g., new application, affidavit, amendment, notice of appeal, appeal brief, drawings, fees, motions, supplemental oath or declaration, petition, etc., and the number of pages being submitted. If a new application is being filed, all parts of the application

being submitted should be separately listed on the postcard, e.g., the number of pages of specification (including written description, claims and abstract), number of claims, number of sheets of drawings, number of pages of oath/declaration, number of pages of cover sheet (provisional application).

The postcard receipt will not serve as *prima facie* evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard “a complete application” or “patent application” will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee) or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portion of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard. Furthermore, merely incorporating by reference in the postcard receipt, the items listed in a transmittal letter will not serve as *prima facie* evidence of receipt of those items. (Emphasis supplied.)

* * *

Therefore, when all of Petitioner's diversionary contentions are peeled away, Petitioner's entire argument is contained in the following excerpts which he quotes from MPEP §503:

* * *

OIPE mails a filing receipt to the attorney or agent, if any, otherwise to the applicant, for each application filed which meets the minimum requirements to receive a filing date.

* * *

[A nonprovisional application, other than a CPA filed under 37 C.F.R. §1.53(d), is entitled to a filing date as of the date of receipt of the specification, including claims, and any required drawing. See 37 C.F.R. §1.53(b).]⁶ The filing receipt will be mailed at the time a determination is made that the application meets the minimum requirements to receive a filing date. The oath or declaration and filing fee may be filed later than the remaining application papers, but if so, they must be accompanied by the required surcharge. See 37 C.F.R. §1.53(f). (Emphasis, the Petitioner.)

* * *

Petitioner ignores the statement addressing corrections to a filing receipt printed on Office filing receipts:

* * *

If you receive a “Notice of Missing Parts” for this application, please submit any corrections to this Filing Receipt with our reply to the Notice. When the USPTO

⁶ Petitioner fails to set forth this sentence.

processes the reply to the Notice, the USPTO will generate another Filing Receipt incorporating the requested corrections (if applicable).

* * *

The Office clearly and expressly states that changes may be expected in the content of a filing receipt.

There is no such statement or expectation as to a receipt card.

Finally, the application contents can be no more than what the applicants set forth and the Office acknowledged on the receipt card on the very day of deposit:

NEW APPLICATION TRANSMITTAL (SMALL ENTITY)
4 ORIGINAL COPIES OF PROVISIONAL
PAGE "CLAIMS"
CASHIERS CHECK FOR \$355.00
2 DECLARATION FORMS
SELF ADDRESSED POST CARD (FOR RECEIPT PURPOSES)

That listing, which provides neither number nor filing date of the provisional application alleged to be part of the contents nor the number of pages contained in that application, does not comply with the specificity that the Office indicates at MPEP §503 would be required for Petitioner to obtain for the Applicants the filing date of 9 June, 2001.

Thus, Petitioner's arguments have been carefully considered, but are not persuasive.

Under 35 U.S.C. §111, the filing date of an application is defined as the date the specification and drawings are received in the U.S. Patent and Trademark Office.

Under 35 U.S.C. §112, a statutory requirement is that "the specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention."

The Office is not unmindful that the applicants may have elected to assemble their application themselves rather than have the process undertaken by a registered practitioner in their efforts to conserve resources. But, having done so, the applicants bear the responsibility of that election.

Waiver of the rules is not warranted when a party makes an avoidable mistake in filing papers.⁷

⁷ Nitto Chem. Indus. Co. v. Comer, 39 USPQ2d 1778, 1782 (D.D.C. 1994).

Clerical inadvertence or error leading to a loss of right is not a ground for requesting waiver of the regulations.⁸

DECISION

In summary, by statute the filing date of a nonprovisional application is the date on which a specification—including the written description of the invention—and a drawing are received in the USPTO.

Because the record does not reflect that the entire application—including the written description of the invention—was deposited in the USPTO until 10 May, 2002, the application papers are not entitled to a filing date of 9 June, 2001.

Accordingly, granting the requested relief would be contrary to the patent statute.

The petition is **denied**.

The filing date of the application remains 10 May, 2002.

Because this petition was not occasioned by the Office, the fee will not be refunded.

The application is being forwarded to Publications Branch to be processed into a patent with the existing filing date of 10 May, 2002.

Telephone inquiries concerning this decision may be directed to John J. Gillon, Jr., Attorney, at (703)305-9199.

Charles Pearson
Director, Office of Petitions

⁸ See: In Re Kabushiki Kaisha Hitachi Seisakusho, 39 USPQ2d 1319, 1320 (Comm'r Pat. 1994).